faith is especially required to be observed when one partner is endeavouring to get rid of another or to buy him out. Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership to do his best for the common body and to share with his co-partners any benefit which he may have been able to obtain from other people and in which the firm is in honour and conscience entitled to participate. In this appeal, although the secret benefit that Mr. Devan had obtained for himself was not in the form of direct monetary gain, he had obtained surreptitiously the position of a director in the take-over company without the knowledge and consent of Mr. Nair. Despite the appellants' denial, the directorship was clearly part of the consideration of the sale of the partnership business. This is self evident from the sale agreement which was not made available to Mr. Nair until legal action was threatened. By obtaining the secret benefit, Mr. Devan had not acted in the utmost good faith towards his co-partners particularly to Mr. Nair.

Now what is the position of Jothi Printers? As stated earlier, their stand is that the sale should not be annulled as they were *bona fide* purchasers for value. Under section 7 of Partnership Act, 1961, every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner. Section 8 also provides that an act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners; provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments. Thus, if a person did not act in his capacity as an agent but as a principal on his own account, his act cannot be imputed to the firm and he alone is liable for them even though the firm may have benefited by them (see *British Homes Assurance Corporation* v. *Paterson*[5]). In this appeal, having regard to its contents, the sale agreement of March 20, 1978 was entered by Mr. Devan with Mr. Siwalingam in his capacity as a principal and sole proprietor of Perchetakan Kota and not as an agent. As such Mr. Devan's act could not be imputed to the partnership. This is consistent with the fact that the purchase money of $38,000/– was never paid to the partnership account. Clearly in law, Jothi Printers of which Mr. Siwalingam was a founder director, could not enforce the agreement against the partnership. The agreement is not binding on the firm nor was Mr. Nair bound by it as a partner. In the circumstances the learned Judge was correct in giving judgment for Mr. Nair as prayed. The sale agreement purporting to dispose of the partnership business at $38,000/– is null and void and of no effect against the partnership which is still subsisting. It therefore follows that Jothi Printers have no right or interest in either the printing business at No. 7, Jalan Mas or in respect of the said premises.

In view of our conclusion, it is unnecessary to deal with the second issue as to whether the tenancy of No. 7, Jalan Mas vested in Mr. Nair for his benefit only or for the benefit of the partnership. Whether the tenancy of the busines premises had become partnership property or not is a question of fact (see *Ashworth* v. *Mann*[6]; *Gian Singh & Co.* v. *Devraj Nahar & Ors.*[7]; and *N.B. Menon* v. *Abdullah Kutty*[8]).

For reasons that we have given, this appeal must be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Subra Naicker & Co.; Elyas Majeed & Co.*

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## JOHARI BIN KHALID & ANOR. v. MOHAMED ZAMRI BIN KHALID & ANOR.

**[F.C. (Salleh Abas L.P., Wan Suleiman & George Seah F.JJ.) July 11, 1984]**
**Kuala Lumpur – Federal Court Civil Appeal No. 276 of 1983]**

*Practice & Procedure – Appeal – Evidence inherently improbable – Finding of Negligence – Appeal allowed.*

*Road Traffic – Motor accident – Question of Liability – Evidence inherently improbable – Finding of negligence – Appeal allowed.*

In this case the learned trial judge found that the appellants were liable for damages sustained in a road

accident by the first respondent. The learned trial judge accepted the evidence of the first respondent that there was a road block, because in his view the first respondent's evidence was consistently given throughout the various stages of the examinations before the court and also because the first appellant's evidence was not consistent and was full of contradictions. The appellants appealed.

**Held**, allowing the appeal: as the basis of the respondent's case is the existence of the road block and as having regard to the respondent's own evidence and the first appellant's evidence, it was inherently improbable for the police to set up such a road block, his case remains unproved.

FEDERAL COURT.

*P.M. Mahalingam* (Senior Federal Counsel) for the appellants.

*David Tay (Christopher Foo* with him) for the respondents.

*Cur. Adv. Vult.*

**Salleh Abas L.P.** (delivering the Judgment of the Court): This is an accident case involving three motorcycles which took place at 5¼ milestone Temerloh/Triang road on August 21, 1976 at about 12.30 p.m. The first motorcycle CA 9349 was ridden by one Saleh bin Razak (deceased), who was killed in that accident. He was survived by his pillion rider, the first plaintiff, who sustained very serious permanent injuries. The second motorcycle CD 4976 was ridden by one Tian Seng who was also carrying a pillion rider. The third motorcycle was a police motorcycle BAB 8068 ridden by first defendant, police constable 58222.

The first plaintiff, the pillion rider on motorcycle CA 9349 sued the defendant and the Government of Malaysia for damages in respect of the injuries sustained by him. Parties had agreed on the quantum of damages and so the issue that went on trial before the learned trial judge was only the question of liability. The trial ended in favour of the first plaintiff and so the defendants appealed.

After hearing arguments on both sides we allowed the appeal and here are our reasons for allowing it.

We appreciate that this appeal is mainly involved with the finding of facts by the court below and as such we should be slow or reluctant to disturb the finding unless it could be shown that the finding could not be sustained having regard to the evidence.

The plaintiff blamed the first defendant for causing the accident, whilst the first defendant on the contrary blamed the deceased rider. There were thus two diametrically different versions as to how the accident occurred. According to the first plaintiff, the deceased and he were riding the motorcycle in question from the direction of Temerloh towards Triang. At the material time and place, the first plaintiff saw what appeared to be a police roadblock, consisting of a police landrover and two motorcycles. All the three vehicles were parked and stationary in one line across the road in such a way that there was hardly any space left for the deceased's motorcycle which was then approaching to pass through. The motorcycle nearest to the land-rover was a civilian motorcycle, presumably CD 4976, whilst the other motorcycle was a police motorcycle presumably BAB 8068. In an attempt to pass through the barrier the deceased's motorcycle collided with the civilian motorcycle CD 4976, which was in the middle of the road and thereafter it collided with the defendant's motorcycle BAB 8068. It is clear that the key to the plaintiff's view on the accident is that all these motorcycles were stationary and that the police were holding a roadblock, using their landrover and the defendant's motorcycle BAB 8068.

The first defendant disputed this version. According to him there was no road block at the material time and place and the defence produced five witnesses to support this contention. The first defendant testified that 8 police constables headed by a police inspector after finishing their roadblock duties were travelling home to Temerloh in a convoy consisting of one landrover and four motorcycles. The landrover which led the convoy and the four motorcycles were all travelling in a single file, each at a distance of 40 to 60 feet to one another with the first defendant's motorcycle being in a second position from the landrover and two other motorcycles behind him. As they were approaching the scene of the accident the first defendant said he saw the deceased's motorcycle following another motorcycle coming from the opposite direction. The deceased's motorcycle knocked into the rear of the civilian motorcycle and then knocked into his (the first appellant's) motorcycle.

The foundation of the defendant's version is that the police party was on the move and not stationary as claimed by the first plaintiff and that there was no roadblock at the material time.

Except for the plaintiff's testimony, all the police personnel, DW1, DW2, DW4, who gave evidence, denied that they were holding a roadblock at the material time and place. Their evidence was confirmed by an independent witness, DW3, who said that whilst he was driving his car towards Temerloh he was over-taken by the police vehilces travelling in the same direction and that ten minutes later he arrived at the scene of the accident. In rejecting the first defendant's version the learned trial judge gave no reason for refusing to accept the evidence of DW3, neither did he give any consideration to the improbability of the police party setting up a roadblock within 10 minutes that had elapsed between the time the police party overtook DW3's car and the time when DW3 arrived at the scene of the accident. It seems, however, that the learned judge accepted the first plaintiff's version that there was a road block, because in his view the first plaintiff's evidence was consistently given throughout the various stages of the examinations before the court, and also because the first defendant's evidence was not consistent and full of contradictions. But let us consider these facts: If the police party did actually set up a roadblock, one would not have expected the deceased to have tried to run through it without stopping. One would have expected him to slow down and stopped. Yet this is not what the first plaintiff had said. On the contrary he clearly said that the deceased's motorcycle was not slowing down at all and that it was travelling at a fast speed and that neither did the deceased rider take any evasive action, nor did the first plaintiff tell the deceased to stop or slow down. Instead he left the deceased to steer through whatever space he could manoeuvre through the barrier. Is such a behaviour consistent with the existence of a roadblock? Another factor is the lightning speed at which the police erected a roadblock. Is it probable or even possible that they could have erected it within such a short time, less than 10 minutes? There is no reason at all for the court to reject the testimony of DW3.

In our view the first plaintiff's evidence is inherently improbable, and as such his case remains unproved. The contradictions in the defendant's evidence to which the learned judge had alluded could not be a basis to weigh the case in favour of the plaintiff. The so-called contradictions merely relate to the question whether the accident was caused by the deceased's motorcycle knocking into the civilian motorcycle CD 4976 first before it finally collided with the first defendant's motorcycle or whether it knocked into the first defendant's motorcycle straight-away. In the police report the first defendant did not specify which motorcycle collided with his motorcycle, nor did he say that the deceased's motorcycle collided with the civilian motorcycle CD 4976 first before colliding with his. This omission, in our view, is a matter of details, and does not affect the crux of the matter which is, whether or not there was a roadblock, official or ad hoc, or otherwise.

That the civilian motorcycle CD 4976 was involved in the accident was undeniable. There was a report regarding the damage to this motorcycle and that there was a police report lodged by its rider, although a witness, namely DW5, who was called by the defence to give evidence turned out to be only the owner of the machine and not the rider who was involved in this particular accident. He confirmed, however, that his machine was involved in the accident and that the rider was his brother who happened to have the same name and identity card number and that at the time of the trial his brother was working at an unknown address in Sabah as a bulldozer driver and therefore could not be called.

In any case the so-called contradictions of the first defendant's evidence were not contradictions because these are in fact confirmed by the plaintiff's own evidence when he said that the deceased's motorcycle first collided with a civilian motorcycle in the centre of the roadblock and later with the defendant's motorcycle.

As the basis of the plaintiff's case is the existence of the roadblock and we are of the view that having regard to the plaintiff's own evidence and the defendant's evidence, it was inherently improbable for the police to set up such roadblock, his case remains unproved.

We therefore allowed the appeal with costs and the deposit to be refunded to the appellants.

*Appeal allowed.*

Solicitors: *Murphy & Dunbar.*